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Lawyers and Client Fraud: They Still Don't Get It

Geoffrey C. Hazard Jr.
UC Hastings College of the Law, hazardg@uchastings.edu

Author: Geoffrey C. Hazard, Jr.

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ARTICLES

Lawyers and Client Fraud: They Still Don't Get It

GEOFFREY C. HAZARD, JR.*

In 1991, the House of Delegates of the American Bar Association (ABA) was asked to approve a proposed amendment to Rule 1.6 of the *Model Rules of Professional Conduct* that would have given a lawyer wider latitude to disclose client fraud than is permitted under Rule 1.6 as it stands. The House rejected that proposal.[1] In 1992, the Standing Committee on Ethics and Professional Responsibility issued Opinion 92-366 that attempts to accomplish the same objective.[2] Opinion 92-366 provoked a dissent protesting that the Opinion's analysis was untenable. These events, together with some other developments to be noted further in this discussion, suggest the following point: When it comes to client fraud, lawyers—at least those involved in promulgating the rules of professional conduct—still don't understand what the problem is. More generally, the bar, at least the ABA, still does not seem to understand the responsibilities entailed in its endeavors to prescribe the law governing lawyers.

In developing these points I will consider a thesis thoughtfully expounded by my colleague, Professor Susan Koniak: The legal profession seeks to maintain its own "understanding" of the lawyer's role and responsibilities.[3] The bar's understanding is at variance with the understanding of the courts and legislatures concerning the role and responsibilities of the lawyer. I believe Professor Koniak's thesis is correct as far as it goes: The bar wants to say what lawyering is, no matter what the courts say it is. The term "understanding" has a double meaning, however. It implies not only that

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* Sterling Professor of Law, Yale University, and Director of the American Law Institute. The author participated in the formulation of the *Model Rules of Professional Conduct* as Reporter for the American Bar Association Special Commission on Evaluation of Professional Standards, the "Kutak Committee."

1. *See* ABA House of Delegates, Tr. of Proceedings, Aug. 12, 1991, at 5-16 [hereinafter ABA/HOD]. *See infra* note 100 and accompanying text.

2. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 92-366 (1992) [hereinafter Op. 92-366]. *See infra* note 110 and accompanying text.

3. Susan P. Koniak, *The Law Between the Bar and the State*, 70 N.C. L. REV. 1389 (1992).

the bar has its own version of the nature of law practice, but also that the bar comprehends the implications of its pronouncements on the subject. In these pages I suggest an interpretation somewhat different from Professor Koniak's, namely that the bar does not understand what it is doing.

I. RULES OF ETHICS VERSUS RULES OF LAW

Until not too long ago, the legal profession had rules of ethics and the courts had rules of law about lawyers. These bodies of norms addressed the same subject—the role and responsibilities of lawyers. However, the bar's norms and the court's norms were not formally integrated with each other and in many respects were contradictory.

The generally accepted version of the bar's norms was expressed in the ABA's *Canons of Professional Ethics*, promulgated in 1908.[4] The 1908 *Canons* were pronounced by the ABA simply on its own authority. Such a pronouncement was wholly lawful and, at least up to a point, entirely sensible. Under generally recognized principles of free speech and private association,[5] the members of a self-conscious group are empowered to articulate to each other their "understanding" of their common vocation and commitment. The 1908 *Canons* constituted the ABA's statement of that understanding. The right of free speech also permits such a group to seek additional adherents to its credo. The ABA did so by proselytizing new members and by persuading state and local bar associations to adopt the 1908 *Canons*.[6] Moreover, the organized bar often argued that the credo of the 1908 *Canons* was law. That is, the bar sought to persuade the courts to adopt as law the bar's "understanding" of the lawyer's role and responsibilities.[7] This too was wholly lawful. It is well established law that a standard of practice in a trade or vocation is at least evidence of the proper legal standard of practice that the law should uphold.[8] Furthermore, a group within the larger society may seek to persuade the state that the group's understanding of its place in society should also be the state's understanding.[9]

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4. CANONS OF PROFESSIONAL ETHICS (1908) [hereinafter 1908 CANONS].

5. *See, e.g.*, NAACP v. Button, 371 U.S. 415 (1963); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-26, at 1010 (2d ed. 1988).

6. *See* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 2.6.2, at 53 (1986).

7. *See, e.g.*, Hunter v. Troup, 146 N.E. 321, 324 (Ill. 1924) (stating that while *Canons* are not binding obligations they constitute a safe guide for professional conduct and an attorney may be disciplined for not observing them).

8. The classic discussion is in *The T. J. Hooper*, 60 F.2d 737, 740 (2d Cir.) (stating that although general practice of a calling is persuasive evidence of the proper legal standard, courts have the final determination), *cert. denied*, 287 U.S. 662 (1932).

9. *See, e.g.*, New York Times v. Sullivan, 376 U.S. 254, 261 (stating the newspaper's conception of responsibility for avoiding defamation); Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV.

The courts' "understanding" of the lawyer's role and responsibilities is expressed in law. This body of law, which can be called the law of lawyering[10] or the law governing lawyers,[11] consists of decisional law augmented by statutory provisions. Until the promulgation of the bar-sponsored *Code of Professional Responsibility* in 1970, the courts were the primary source of the law governing lawyers.[12] The law governing lawyers had been synthesized in legal doctrine and law treatises. A treatise on the subject in the grand tradition, published not long after the ABA's 1908 *Canons* were promulgated, was *A Treatise on Attorneys at Law* by Edward M. Thornton.[13] Thornton's two volume work addressed such matters as conflict of interest, the attorney-client privilege, and the formation of the lawyer-client relationship. It pronounced, for example, that the attorney-client privilege attaches "to communications between an attorney and a prospective client, preliminary to the retainer, where the attorney reasonably believes that his services may be required."[14] Statutory provisions in the law governing lawyers included such as those in the California Business and Professions Code. For example, Section 6068(c) of the code, which dates back to 1872, provides that:

> It is the duty of an attorney . . . to counsel or maintain such actions, proceedings or defenses only as appear to him legal or just, except the defense of a person charged with a public defense.[15]

Many discrepancies have existed between the norms governing law practice as expressed by the bar and those expressed by the courts. Some discrepancies repose in the terms of the rules themselves: The norms stated in the bar's ethics credo have said one thing, but the rules of law something else. Notable among these discrepancies was the norm governing client perjury. The bar's understanding was that the client, at least a criminally accused, was not to be given away for committing perjury while testifying.[16] The court's understanding was that lying on the stand was not permitted, even by a criminal accused, and that a lawyer could not help a client in

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L. REV. 4 (1983). *Compare* GEOFFREY C. HAZARD, JR., ETHICS IN THE PRACTICE OF LAW (1978).

10. *See generally* GEOFFREY C. HAZARD & W. WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT (2d ed. 1990).

11. The most recent product of this project is the RESTATEMENT OF THE LAW GOVERNING LAWYERS (Am. Law Inst. Tent. Draft No. 5, 1992).

12. WOLFRAM, *supra* note 6, at 22.

13. EDWARD M. THORNTON, A TREATISE ON ATTORNEYS AT LAW (1914).

14. *Id.* § 77; *compare* RESTATEMENT OF THE LAW GOVERNING LAWYERS § 112 cmt. d (Am. Law Inst. Tent. Draft. No. 3, 1990).

15. CAL. BUS. & PROF. CODE § 6068(c) (West 1990). *Compare* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 (1983) [hereinafter MODEL RULES].

16. *See generally* MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS ch. 6 (1990).

doing so.[17] Another illustration of the discrepancy of norms concerned whether a lawyer has a duty to "rat" on a fellow lawyer who has committed grievous misconduct.[18]

There has been an equally important but less obvious discrepancy between the understanding of the lawyers and that of courts as to whether a given norm was to be rigorously obeyed or treated as merely precatory. Notable in this regard was the norm about what a lawyer should do when confronted by the fact that a client had committed fraud. Canon 41 of the 1908 *Canons* stated:

> When a lawyer discovers that some fraud or deception has been practiced . . . he should endeavor to rectify it; at first by advising his client, and if his client refuses to forego the advantage thus unjustly gained, he should promptly inform the injured person or his counsel, that they may take appropriate steps.[19]

This norm seems pretty clear. If language means anything, Canon 41 requires a lawyer to take steps to rectify fraud committed by a client, if the client refuses having been called upon to do so. In scope, Canon 41 goes beyond matters involved in the lawyer's representation, so the lawyer would be required to rectify a fraud unrelated to the lawyer's own involvement. Nor is the language of Canon 41 limited to continuing or future frauds. The words "has been practiced" plainly refer to transactions already completed and hence would require a lawyer to turn in a client for a fraud, long since consummated.

But of course the bar did not understand its credo this way, nor, on a balanced view, should the duty concerning client fraud have such sweep. The bar's way out lay not through amendment of Canon 41, which would entail awkward discussion of the realities of law practice, but through restrictive interpretation. The ABA Ethics Committee held that a lawyer's duty of confidentiality precluded a lawyer from disclosing information that might embarrass the client.[20] As a practical matter this nullified Canon 41, since it would almost be impossible to rectify a client fraud without disclosures that would embarass the client. Hence, a contradiction existed between the ethical norm stated in Canon 41 and that stated in the accepted interpretation.

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17. *See* Nix v. Whiteside, 475 U.S. 157, 168-71 (1986) (holding that the Sixth Amendment right of a criminal defendant to assistance of counsel is not violated when an attorney refuses to cooperate with the defendant in presenting perjured testimony).

18. *See, e.g., In re* Himmel, 533 N.E.2d 790, 796 (Ill. 1988) (holding that attorney's failure to report misconduct of attorney who had formerly represented client warranted one year suspension); *cf.* Wieder v. Skala, No. 256, 1992 WL 379041 (N.Y. Dec. 22, 1992).

19. 1908 CANONS Canon 41.

20. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 341 (1975).

On one analysis, this is sheer hypocrisy. On another analysis, however, the contradiction is merely apparent. It could be that the bar's norms were intended to be moral and fraternal admonitions, not legal rules. Considering the 1908 *Canons* as a professional credo but not a set of legal obligations, the bar's understanding about client fraud would be essentially as follows:

> In the representation of a client in court or in a transaction, it sometimes happens that the client commits a fraud, such as giving false testimony or producing falsified accounting statements. In such a situation the client is directly defrauding the other party, and, in a litigated matter, the court as well. Indirectly the client is also defrauding the lawyer. No self-respecting lawyer would be party to a transaction tainted by fraud, and Canon 41 states the views of self-respecting lawyers. When Canon 41 applies therefore, the lawyer is one of the victims of the client's wrong-doing.
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> However, getting stiffed by a client—over a fee, over what the facts are, over what the client really wants to accomplish—is simply part of a professional's life. The resolution of such situations has to be worked out case by case, depending on the seriousness of the client's misconduct, the severity of the possible consequences, the relationship with the client, the nature of the community in which the situation has arisen, and other relevant circumstances. Every lawyer knows you don't turn in a client except in extreme cases. What the courts might do, if it gets to that, is their business. However, every lawyer also knows, as Thurman Arnold was told, that "If it comes to whether you go to jail or your client does, make sure it's the client."[21]

This "understanding" of the lawyer's role and responsibility in dealing with client fraud—or other messy aspects of practice—is perfectly intelligible if recognized for what it is: A vision of the lawyer's calling as defined internally by the members of the profession—their "narrative" of their world as they understand it and the norms for working out its interfaces with the larger society.[22]

II. THE LAW GOVERNING LAWYERS

However, it is always possible that a client fraud, whether committed in litigation or in a transaction, may come to the attention of the courts and become a legal problem. In that case, the courts will apply their understanding of the lawyer's calling through the norms they have articulated as the law governing lawyers. What are those legal norms?

The relevant law governing lawyers includes all aspects of the law at

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21. *See* HAZARD, *supra* note 9, at 86.
22. *See* Koniak, *supra* note 3, at 1392-93.

large—contract law, the law of secured transactions, conveyancing, criminal procedure, estate planning, and all the rest. More specifically, it includes general principles of substantive tort and criminal law, the law of agency, corporation law, special rules that govern participants in transactions in which lawyers are typically involved, and legal rules specifically addressed to lawyers.

A. CRIMINAL, TORT AND AGENCY LAW

In representing a client, a lawyer is an agent acting for the client as principal. As such, the lawyer is generally governed by the principles of agency law. Under the principles of agency law, an agent is permitted to perform lawful acts in furtherance of the principal's purpose, but not unlawful ones. An agent is not liable for innocently performing acts in furtherance of a purpose of the principal that is in fact, but unbeknownst to the agent, criminal or tortious. However, an agent who is aware that the principal's purpose is criminal or tortious, and who with such knowledge lends assistance in furthering the purpose, is liable under principles of accessorial liability. Where the conduct is charged as criminal, accessorial liability is determined according to the concepts of aiding and abetting.[23] Where the conduct is charged as tortious, accessorial liability is determined according to the concept of joint tort liability.[24]

Concerning a lawyer's accessorial liability, it is impossible to improve on the general statement by Judge Henry Friendly. Judge Friendly, who had previously been a name partner in a leading Wall Street firm and general counsel to a leading international business corporation, said in *United States v. Benjamin*:

> In our complex society the accountant's certificate and the lawyer's opinion can be instruments for inflicting pecuniary loss more potent than the chisel or the crowbar. Of course, Congress did not mean that any mistake of law or misstatement of fact should subject an attorney or an accountant to criminal liability simply because more skillful practitioners would not have made them. But Congress equally could not have intended that [people] holding themselves out as members of these ancient professions should be able to escape criminal liability on a plea of ignorance when they have shut their eyes to what was plainly to be seen or have represented knowledge they knew they did not possess.[25]

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23. *See generally* Sanford H. Kadish, *Complicity, Cause and Blame: A Study of the Interpretation of Doctrine*, 73 CAL. L. REV. 323 (1985).

24. *See generally* Geoffrey C. Hazard, Jr., *How Far May a Lawyer Go In Assisting a Client in Unlawful Conduct?*, 35 U. MIAMI L. REV. 669 (1981).

25. United States v. Benjamin, 328 F.2d 854 (2d Cir.), *cert. denied*, 377 U.S. 953 (1964). It may be noted that this decision was written in 1964; the law stated in the text is not new doctrine.

This analysis equally applies to civil liability for assisting a client in fraud[26] or intentional torts.[27] A lawyer also can be liable for negligently participating in misrepresentation, particularly where the client has a duty to disclose the facts to the other party in a transaction. The decision by Judge Richard Posner in *Greycas, Inc. v. Proud*[28] is coming to be recognized as the leading case regarding a lawyer's liability for negligent misrepresentation. As Judge Posner states:

> One who in the course of his business or profession supplies information for the guidance of others in their business transactions is liable for negligent misrepresentations that induce detrimental reliance . . . [The lawyer for the borrower,] in the practice of his profession, supplied information (or rather misinformation) to [the lender] that was intended to guide [the lender] in commercial dealings with [the borrower]. [The lawyer] therefore had a duty to use due care to see that the information was correct.[29]

Thus, client fraud, as understood by the courts, entails accessorial liability, criminal and civil, for a lawyer who is a knowing participant, and may entail accessorial civil liability for a lawyer who is merely negligent.

B. CORPORATION LAW

A salient subcategory of agency law is that regulating the relationship between a corporate client and corporate officers.[30] In the ordinary practice of business law, a lawyer represents the corporation as an entity and not some "constituent" of the corporation such as the CEO or the board of directors.[31] The corporation, and not the corporation's officers or directors,

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26. *See, e.g.*, Newburger, Loeb & Co., Inc. v. Gross, 563 F.2d 1057, 1080 (2d Cir. 1977) (stating that while an attorney is privileged to give honest advice, even if it is erroneous, admission to the bar does not create a license to act fraudulently), *cert. denied sub nom.*, Finley v. Gross, 434 U.S. 1035, *and cert. denied*, Gross v. Newburger, Loeb & Co., 434 U.S. 1035 (1978). A few aberrant decisions have held otherwise, but they are clearly wrong. *See, e.g.*, Schatz v. Weinberg & Green, 112 S. Ct. 1475 (1992) (holding that attorney was not liable as an accessory in delivering to a third party a financial statement by the client which the lawyer knew to be false).

27. *Cf.* Chambers v. NASCO, Inc., 111 S. Ct. 2123 (1991) (holding that courts have inherent power to assess attorney fees as sanction for bad faith conduct such as obstruction of civil justice).

28. 826 F.2d 1560, 1565 (7th Cir. 1987) (holding that attorney who misrepresents information to lender as to prior liens on property is liable where lender detrimentally relies on representation in making loan), *cert. denied*, 484 U.S. 1043 (1988).

29. *Id.* at 1565 (quoting RESTATEMENT (SECOND) OF TORTS § 552 (1977)). Hence, this too is not new law.

30. *See generally* Geoffrey C. Hazard, *Triangular Lawyer Relationships: An Exploratory Analysis*, 1 GEO. J. LEGAL ETHICS 15 (1987).

31. Of course, in various circumstances, for example, in defending a stockholders derivative suit, the board and officers of the corporation may be separately represented. *See, e.g.*, PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 7.09(a)(2) (Am. Law Inst. Proposed Final Draft 1992) (providing independent representation for special board committee to evaluate derivative suit).

is owed the duties that run from lawyer to client. The corporate officers are merely co-agents of the corporate client, along with the lawyer; the corporate directors are either other co-agents or are trustees for the client.[32]

From this relationship two corollaries follow. First, the corporate directors and officers are not owed the panoply of duties that a lawyer owes to a client, particularly the duty of loyalty and the duty to maintain confidences for protection of the client. Rather, it is the corporation as an entity that enjoys these protections.

Second, the lawyer as agent for the corporation has a duty, of distinct character if uncertain dimension, to take measures to protect the client from the wrongful acts of other corporate agents. This protective obligation, derived from the intersection of agency law and corporation law, is outlined in Rule 1.13(b) of the ABA *Model Rules*:

> If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization . . . .[33]

Lawyers often have difficulty recognizing and accepting these aspects of agency and corporation law. In the practicing lawyer's "understanding," the people they talk to in serving the client—the corporate officers, directors, and other personnel—*are* their clients. But the law is otherwise.[34] And it follows that the courts may impose liability on a corporate lawyer for failing to take reasonable protective action to safeguard the corporate client against the wrongful acts of its officers.

An application of this proposition occurred in *FDIC v. O'Melveny & Myers*.[35] In that case, successor management in the corporate client sued the corporation's attorneys for having been negligent in assisting prior

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32. *See, e.g.*, Yablonski v. United Mine Workers of America, 448 F.2d 1175 (D.C. Cir. 1971), *cert. denied*, 406 U.S. 906 (1972). Again, the rules involved are long established.

33. Again, the principle involved is not new. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-18 (1969) [hereinafter MODEL CODE]:

A lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity.

Id. See also Developments in the Law: Conflicts of Interest in the Legal Profession, 94 HARV. L. REV. 1244, 1335-37 (1981).

34. *See generally* ANN. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13 (1992) (references cited therein).

35. 969 F.2d 744 (9th Cir. 1992).

management in the issuance of a securities offering.[36] The complaint alleged that the attorneys had not taken adequate care to determine whether the statements about the corporation's financial situation, incorporated in documents prepared by the attorneys, were materially misleading.[37] The financial statements were indeed materially misleading, for the corporation's top officials had lied to the attorneys about the company's financial situation.[38]

The corporate officials' behavior therefore resulted—to use the language of Rule 1.13(b)—in "a violation of law which reasonably might be imputed to the organization."[39] The gravamen of the complaint in the *O'Melveny & Myers* case was that the attorneys had not used due care *for protection of the corporate client*, specifically that they did not inquire of the company's outside accountants about the accuracy of the finances.[40]

A corporate lawyer is therefore chargeable with negligent failure to protect a corporate client against harm by faithless or reckless corporate agents. This puts many "client" fraud cases in quite different perspective.

C. SPECIAL TRANSACTION RULES

Beyond the general rules of law governing transactions, there are manifold special rules that govern various types of transactions in which lawyers are typically involved. Illustrative of these special rules are those governing securities transactions, filing of income tax returns, regulatory reporting requirements such as those under the Hart-Scott-Rodino Act, and disclosure requirements such as those under the patent laws. Virtually all such obligations have been authored by the legislature rather than the courts, and thus may be regarded as speaking with enhanced political authority.

In general form, these legal rules require the client to be specially forthcoming in a private transaction, or with a regulatory agency, or both. Thus, the securities laws require that an offering statement submitted to a prospective buyer contain disclosures that, considered as a whole, are not materially misleading.[41] The income tax law imposes penalty liability where a deficiency results from a claim of exemption or deduction that fails to meet a specified standard of legal plausibility.[42] The Hart-Scott-Rodino Act requires detailed disclosures concerning potential anti-competitive effects of

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36. *Id.* at 746.
37. *Id.* at 747.
38. *Id.*
39. MODEL RULES Rule 1.13(b).
40. FDIC v O'Melveny & Myers, 969 F.2d 744, 744 (9th Cir. 1992).
41. *See* 17 C.F.R. § 240.10b(5) (1992).
42. Treas. Reg. § 1.6662-3 (1991).

proposed corporate mergers.[43] Under the patent laws, an applicant is required to disclose various aspects of previously established art and knowledge.[44]

These are merely examples. The modern regulatory state imposes similar requirements on all kinds of business transactions and operations. Each such requirement entails risks of noncompliance by neglectful omission or deliberate concealment. Moreover, every reporting requirement necessitates referral to some kind of underlying corporate data, such as test results or accounting records. Compliance with reporting requirements therefore implicates the validity and bona fides of data compiled by the client.

A lawyer for a business client often will be involved in preparing or reviewing the reports to be provided to the government or the opposite transaction party. This participation can implicate the lawyer legally if the reports later turn out to be inaccurate. Putting the matter differently, where the client is charged with a special duty of truth-telling, and the lawyer undertakes to assist the client in complying with that duty, the lawyer generally assumes a corresponding although more narrowly bounded special duty about telling the truth. At minimum, the lawyer will owe *the client* a duty of due care in the assistance provided. Such was the duty asserted in *O'Melveny & Myers*.[45] Beyond this, the lawyer may owe a duty of due care to third parties. Such was the duty asserted in *Greycas, Inc.*[46] And in some cases the lawyer may owe a duty to the regulatory authority. Such at any rate was the contention made by the RTC against the Kaye, Scholer firm.[47]

D. LEGAL RULES SPECIFICALLY ADDRESSED TO LAWYERS

Although many of a lawyer's legal duties are derivatives of duties primarily imposed on the client, there are some legal duties addressed directly to lawyers. In this category are the now obsolete restraints imposed by the law of champerty and maintenance[48] and the nearly obsolete tort of abuse of process.[49] However, the evolving rules on sanctions for frivolous litigation, notably Rule 11 of the Federal Rules of Civil Procedure, address a

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43. 15 U.S.C. §§ 15c-h, 18a, 66 (1988).

44. 35 U.S.C. § 112 (Law. Co-op 1972).

45. FDIC v O'Melveny & Myers, 969 F.2d 744, 744 (9th Cir. 1992); *see supra* text accompanying note 35.

46. Greycas, Inc. v Proud, 826 F.2d 1560, 1560 (7th Cir. 1987); *see supra* text accompanying note 28.

47. *See* Susan P. Koniak, *When the Courts Refuse to Frame the Law and Others Frame it to Their Will*, 66 S. CAL. L. REV. 40 (1993).

48. *See* WOLFRAM, *supra* note 6, § 8.13.

49. *See* Friedman v. Dozorc, 312 N.W.2d 585, 605 (Mich. 1981) (holding, inter alia, that in order to recover for abuse of process, it must be shown that the defendant had an improperly concealed motive).

functionally similar command to lawyers involved in litigation.[50]

Here, the gap is conspicuous between the bar's traditional understanding of the ethics of advocacy and the courts' understanding of an advocate's legal obligations. The bar has long pronounced against frivolous litigation. As stated in Canon 30 of the 1908 *Canons*:

> [A lawyer's] appearance in Court should be deemed equivalent to an assertion on his honor that in his opinion his client's case is one proper for judicial determination.[51]

This obligation, however, was generally regarded as a matter of professional honor, whose violation was redressable only by retaliation. This conception of the norm was generally accepted by both the bar and the bench until 1983. The revision of Rule 11 in that year, more to the liking of judges, adopted an objective standard in the norm prohibiting frivolous litigation, and imposed mandatory cost sanctions for violation.[52] The subsequent controversy over the interpretation and administration of Rule 11 illustrates the persisting difference between the understanding of the advocate's discretion that is widely held by the bar and the understanding that widely prevails among the bench. Although changes are likely as a result of the pending proposals for revision of Rule 11, the law of federal civil procedure appears committed to an objective standard of responsibility, enforceable with cost sanctions.[53]

The advocate's obligation of candor to the court includes other legal duties. The most difficult of these is that concerning perjured testimony by a client, where the difference in understanding between the bench and bar has already been noted.[54] Other legal duties of the advocate concern the preservation and use of real evidence such as documents and instrumentalities of crime.[55]

The courts have rarely imposed direct duties on lawyers except in connection with the advocate's function in litigation. However, the legislatures have undertaken to impose such regulations. One area has been lawyer fees. A notorious example is the Congressional limitation on fees in connection with claims for veterans' benefits.[56] A number of states have enacted

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50. *See, e.g.*, Georgene M. Vairo, *Rule 11: Where We Are and Where We are Going*, 60 FORDHAM L. REVIEW 475 (1991).

51. 1908 CANONS Canon 30.

52. FED. R. CIV. P. 11.

53. *See* BENCH-BAR PROPOSAL TO REVISE CIVIL PROCEDURE RULE 11, 137 F.R.D. 159 (1991).

54. *See supra* text accompanying note 15.

55. *See, e.g.*, Hitch v. Pima County Court, 708 P.2d 72 (Ariz. 1985); Fisher v. United States, 425 U.S. 391 (1926).

56. *See* Walters v. Nat'l Ass'n of Radiation Survivors et al., 473 U.S. 305 (1985).

limitations on contingent fees in medical malpractice cases.[57] The intended effect of these regulations is to change lawyer behavior by changing the returns that may be earned for certain types of legal services. Specific legislative direction of the conduct of law practice is still rare. However, such a regulation has recently been enacted in the Reform, Recovery and Enforcement Act of 1989.[58] Under that statute, lawyers along with certain other specified corporate agents—officers, directors, and accountants—are subject to special obligation to report possible legal wrongdoing by financial institutions which they represent. Whether similar specific directions will be imposed in other regulatory regimes remains to be seen. However, the legislative precedent has been established. And, of course, there is also the Racketeer Influenced and Corrupt Organization Act.[59]

Thus, under the regime of the 1908 *Canons* and before, the bar's understanding of the lawyer's role and responsibility was one thing; the court's was something else.[60] A few states, notably California, had adopted more comprehensive regulations governing the practice of law.[61] In addition, over the decades prior to 1970 the Supreme Court imposed various Constitutional limitations on what the bar and the state courts could do in the way of controlling maverick lawyers.[62] Taking the governance system as a whole, however, the bar could well say, "What the courts might do, if it gets to that, is their business."[63]

III. CONTROL OF REALITY

A. THE IMPORTANCE OF FORUM

An understanding of the lawyer's role and responsibilities depends not only on the norms governing them but also on the factual scenarios to which the norms might apply. Serious questions of compliance with professional norms arise only when charges of professional conduct must be taken

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57. *See* Richard M. Birnholz, Comment, *The Validity and Propriety of Contingent Fee Controls*, 37 UCLA L. REV. 949 (1990).

58. Financial institutions Reform, Recovery and Enforcement (FIRREA) Act of 1989 , Pub. L. No. 101-73, Title IX, § 901, 103 Stat. 446, 12 U.S.C. 1786 (1989).

59. Racketeer Influenced and Corrupt Organizations (RICO) Act, 18 U.S.C. § 1961 (1988). *See* United States v. Teitler, 802 F.2d 606, 612 (2d Cir. 1986) (holding that a law firm participating in various frauds was a criminal enterprise within the meaning of the RICO statute).

60. *See supra* note 14 and accompanying text.

61. The California Rules of Professional Conduct, adopted by the Supreme Court of California in 1928, augmented the statutory provisions in that state's Business and Professions Code.

62. *See, e.g.*, Konigsberg v. State Bar, 366 U.S. 36, 41-43 (1961) (discussing standards for admission to practice); *In re* Ruffalo, 390 U.S. 544, 550 (1968) (discussing due process procedural standards in disciplinary determinations); Bates v. State Bar of Arizona, 433 U.S. 350, 355 (1977) (regarding lawyer advertising).

63. *See supra* text accompanying note 18.

seriously. Whether a charge of professional conduct must be taken seriously depends in large part on the available tribunals in which such charges may be brought, and on the presuppositions upon which the tribunals begin—not only burden of proof in the narrow sense, but the assumptions made about the normal course of events in the practice of the profession.

If a tribunal presupposes that there are "only a few bad apples" in the profession, it will be inclined to assume, even in the face of conflicting evidence, that a lawyer's conduct was honorable. Moreover, on the assumption that lawyers almost always act honorably, differences in the precise meaning of the norms to be applied have little practical consequence. Thus, if the tribunal assumes that lawyers almost always act honorably, except when there is conclusive evidence to the contrary, it makes no practical difference whether the legal standard is that an accused lawyer "knows" the client was lying or submitting false financial statements, or merely "has reason to know." The bar could promulgate one standard, the courts another, and nothing would turn on the discrepancy.

A vital question concerning lawyer misconduct, therefore, is the identity for the tribunal and the nature of its presuppositions. In the administration of the law at large, the courts conduct or control inquests, discovery proceedings and trials, and determine the sufficiency of evidence to support findings or a verdict. That is to say, for purposes of applying legal norms, the courts ordinarily control what will be taken as reality. In matters involving lawyers' professional conduct, until recent years the bar substantially controlled the tribunals in which such matters were heard. That is to say, the bar controlled what was to be taken as reality.[64]

B. CHANGE OF VENUE

There are six types of tribunals in which a question of lawyer misconduct now can arise: Professional ethics committee deliberations; disciplinary proceedings; civil malpractice suits; the courts in exercise of their authority to regulate lawyers appearing before them; criminal proceedings carried out by prosecutor offices; and administrative agency discipline of lawyers engaged in agency practice.

All of these tribunals are largely controlled by lawyers insofar as lawyers are required for them to function. To the extent that lawyers themselves have an homogeneous understanding of their professional role and responsibilities, the bar's understanding of professional norms determines the frame of reference in all these tribunals. Two important changes have occurred in

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64. *See* Dave Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799 (1992).

recent years, however. First, the control over these tribunals by the traditional core of the bar—practitioners in independent firms—has been greatly reduced. Second, the understanding of practice norms held by the traditional core of the bar is no longer fully shared by lawyers who control these tribunals.

Of the six types of tribunals, the organized bar formerly controlled three—the ethics committees, the disciplinary committees and civil malpractice suits. The organized bar also strongly influenced the outlook of the courts, the criminal justice system, and the regulatory agencies. Thus, the committees on professional ethics proceeded in a normative world wholly created by lawyers. The opinions of these committees were based on undisputed and usually antiseptic facts, typically those stipulated for them by the lawyer whose conduct was in question. Traditionally the committees on professional ethics never cited legal authority, such as relevant criminal, tort and agency law. Their standard position was that questions of law were beyond their ken, even such obvious propositions as that a lawyer can be an accessory to a client's criminal conduct.[65]

In similar fashion, disciplinary committees in virtually every state were controlled by the organized bar, even where they were nominally under the control of the courts. The private bar on a volunteer basis carried out the preliminary investigations, heard the evidence, made the findings, and recommended the dispositions. Although the courts reserved the power to consider disciplinary matters *de novo*, the judiciary's function was usually performed by appellate review of a record made before a bar committee. In any event, the system was notoriously inefficient.[66]

Civil suits for professional malpractice were severely inhibited by a fraternal norm of mutual forbearance. Members of the bar generally adhered to a policy of abstention from legal recrimination against fellow lawyers like that then prevailing in the medical profession.[67]

These were the mechanisms through which evidence of professional misconduct ordinarily would be sifted. They were only occasionally augmented by judicial authority imposing sanctions in litigation and by criminal investigations focussing on lawyer complicity. Regulatory agency initiatives against lawyers were almost unheard of.

Since bar-controlled tribunals had the primary hand in defining the reality of practice, that definition reflected the bar's understanding of itself. In this understanding, clients were ordinary folks needing and deserving the

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65. This attitude toward the larger legal context still generally appears to prevail. *See* Richard H. Underwood, *Confessions of an Ethics Chairman*, 16 J. OF THE LEGAL PROF. 125 (1991).

66. *See generally* ABA Special Comm. on Evaluation of Disciplinary Enforcement (1970) [hereinafter ABA Special Comm.].

67. *See* WOLFRAM, *supra* note 6, § 5.6.1.

protection of law, law enforcement was properly concerned with control of violent crime, and lawyers were socially responsible intermediaries engaged in a morally unproblematic calling.[68] Never mind that the bar's own study demonstrated that ordinary folks actually made use of lawyers only once or twice in their lives,[69] from which it followed that most law practice must have to do with affairs of business and government. Never mind that the unlovely revelations about lawyers' work had been made by insiders such as Louis Auchincloss,[70] from which it was apparent that even elite law practice was riven with moral ambiguity. Never mind that corruption scandals involved lawyers not only in the cleanup but in the coverup.[71]

The year 1970, however, marked an emerging transformation in control over the procedures for defining the realities of law practice. In that year, the ABA Clark Committee recommended sweeping changes in the structure and procedure for disciplinary enforcement.[72] Contemporaneously, the incidence of civil suits for legal malpractice began to rise, reflecting dissolution of the "professional conspiracy" against suing lawyers.[73] Motions to disqualify[74] and other sanctions directly administered by the courts began to proliferate.[75] Administrative agencies took occasion to exercise their regulatory authority over the bar.[76]

As a consequence of these developments, control of fact determinations in disciplinary matters were passing to formally constituted tribunals acting on the basis of presentments by professional prosecutors;[77] fact determinations in connection with judicial sanctions such as motions for disqualification, which had always been in the hands of judges, were becoming an

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68. This version of law practice was most vividly and consistently reflected in the opinions of the ABA Standing Committee on Professional Ethics during the long tenure of Henry Drinker as chair of that committee. *See* HENRY S. DRINKER, LEGAL ETHICS (1953). A neo-realist analysis of this body of work would be interesting.

69. *See* BARBARA A. CURRAN, THE LEGAL NEEDS OF THE PUBLIC: THE FINAL REPORT OF A NATIONAL SURVEY (1977).

70. *E.g.*, LOUIS AUCHINCLOSS, POWERS OF ATTORNEY (1963); *see, e.g.*, JAMES G. COZZENS, BY LOVE POSSESSED (1957).

71. Watergate was of course the prime example.

72. ABA Special Comm., *supra* note 66. The committee was called the Clark Committee after its chair, retired Justice Tom C. Clark of the United States Supreme Court. For an account of developments since, *see* Timothy K. McPike and Mark I. Harrison, *Lawyer Discipline Since 1970*, in ALI-ABA, Law Practice Quality Evaluation: An Appraisal of Peer Review and Other Measures to Enhance Professional Performance (1987).

73. *See* Jesse Dukeminier, *Cleansing the Stable of Property: A River Found at Last*, 65 IOWA L. REV. 151 (1979).

74. WOLFRAM, *supra* note 6, § 7.5.2(e).

75. *See, e.g.*, Nat'l Hockey League v. Metro. Hockey Club, 427 U.S. 639, 643 (1976) (dismissing civil action for attorney's noncompliance with procedural directives).

76. *See, e.g.*, *In re* Carter & Johnson, Fed. Sec. L. Rep. (CCH) ¶ 82, 847 (1981).

77. *See* MODEL STANDARDS OF DISCIPLINARY ENFORCEMENT (1979).

ordinary incident of litigation practice;[78] the regulatory agencies began to make their own fact determinations as to whether such misconduct had occurred;[79] and, fact determinations were increasingly being made in malpractice cases, by juries. The profession, as such, no longer has primary control over the scenarios on which an "understanding" of law practice is predicated.

C. THE LAW OF EVIDENCE

The connection between substantive norms, whatever their source, and the law of evidence is so obvious that it is easily ignored. However, the law of evidence determines how facts are established in the tribunals that now determine the reality upon which the law governing lawyers is administered.

Three rules in the law of evidence are salient. These are the single witness rule, the statute of frauds, and the rules governing inferences that a trier of fact may draw from the professional identity of the participants in a transaction.

The single witness rule is that the testimony of a single witness is a sufficient basis for a trier of fact to find a conclusion in the face of conflicting evidence.[80] The law used to be that an interested party was not a competent witness, so that an independent witness was necessary if disputed facts were to be proven. No more. Juries used to be instructed that a party's testimony was to be viewed with suspicion. No more. Under the contemporary law of evidence, a case against a lawyer can be submitted to the trier of fact, very often a jury, on the basis of testimony by a single interested witness. In cases where a lawyer is charged with complicity in a client's wrongdoing, such as fraud, that single interested witness is very likely to be the former client, or an officer of a former corporate client.

The second salient rule of evidence law is the statute of frauds. The point is that the statute of frauds does not apply. In certain kinds of contract cases, the statute of frauds precludes liability unless there is a sufficient writing.[81] However, there is no requirement that lawyer misconduct be established through a writing or other nontestimonial evidence. Hence, a case against a lawyer can be established by the recollection of a single witness, typically the former client or an officer of a former corporate client.

The third rule of evidence concerns the inferences that a trier of fact is

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78. *See, e.g.*, Chambers v. NASCO, Inc., 111 S. Ct. 2123 (1991).

79. *See, e.g.*, *In re* Carter & Johnson, Fed. Sec. L. Rep. (CCH) ¶ 82.

80. *See* FLEMING JAMES ET AL., CIVIL PROCEDURE § 7.19 (4th ed. 1992); EDWARD W. CLEARY ET AL., MCCORMICK ON EVIDENCE § 338 (1984).

81. *See* E. ALAN FARNSWORTH, CONTRACTS ch. 6 (1990).

permitted to draw from the fact that the participants in the transaction have specialized professional knowledge and experience. In shorter words, this means the inferences a jury can draw against a lawyer. Here again reference may be made to Judge Friendly's seminal opinion in *Benjamin*.[82] The question on appeal in that case was whether the evidence was sufficient to have permitted the jury to find that the defendant lawyer had knowledge of the fraudulent character of the transactions in question, under securities fraud and mail fraud statutes requiring such knowledge. Judge Friendly said:

> -Quoting from a 1926 decision of the Second Circuit:
>
> "When [the requite] state of mind is a knowledge of false statements, while there is no allowable inference of knowledge from the mere fact of falsity, there are many cases where from the actor's special situation and continuity of conduct an inference that he *did* know the untruth of what he said or wrote may legitimately be drawn."[83]
>
> -Quoting from a 1941 decision by Judge Learned Hand:
>
> "[T]he cumulation of instances, each explicable only by extreme credulity or professional expertness, may have a probative force immensely greater than any one of them."[84]
>
> -In Judge Friendly's own words:
>
> "[T]he Government can meet its burden by proving that the defendant deliberately closed his eyes to facts he had a duty to see . . . or recklessly stated as facts things of which he was ignorant."[85]

As a personal note, I have been an expert witness in more than eighty cases involving claims of legal wrongdoing by lawyers. I have reviewed most of the deposition testimony in all of these cases and virtually all of the relevant deposition testimony in most of them. In all but a handful of these cases, there was a significant difference between the account of the transaction given by the lawyer whose conduct was in issue and that given by the lawyer's antagonist. In many of these cases, essentially one statement by the principal adverse witness precluded a summary judgment in favor of the lawyer. Moreover, it was sometimes the basis of settlement for a substantial sum paid by the lawyer or the lawyer's liability insurer. The statement by the single witness in these cases was to the effect: "I told the

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82. United States v. Benjamin, 328 F.2d 854 (2d Cir.), *cert. denied*, 377 U.S. 953 (1964); *see also supra* text accompanying note 25.

83. Bentel v. United States, 13 F.2d 327, 329 (2d Cir.), *cert. denied sub nom.*, Amos v. United States, 273 U.S. 713 (1926).

84. United States v. White, 124 F.2d 181, 185 (2d Cir. 1941).

85. *Benjamin*, 328 F.2d at 862.

lawyer that . . . ."

In the context of this change in control of reality the ABA sought in 1970, in the *Model Code*, to establish its understanding of law practice as rules of law.

IV. LEGAL RULES OF ETHICS

The *Model Code* undertook to make pronouncements not only of relevant ethical norms but also of legal rules. The latter were denominated Disciplinary Rules and were contradistinguished from a corresponding set of norms denominated Ethical Considerations. The Preliminary Statement to the *Model Code* stated:

> The Disciplinary Rules, unlike the Ethical Considerations, are mandatory in character. [They] state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action . . . [They] should be uniformly applied to all lawyers, regardless of the nature of their professional activities.[86]

A. THE RESPONSIBILITY OF A LAW-GIVER

Although the Preliminary Statement described these "mandatory" norms in the Disciplinary Rules as "minimum level of conduct," it also said that the Disciplinary Rules were irrelevant to matters of legal malpractice and other nondisciplinary contexts.[87] A somewhat more artful disclaimer was made in 1983 in the *Model Rules*.[88] These efforts were predictably futile, however, if not fatuous.[89] Norms stated as obligatory

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86. MODEL CODE pmbl.; MODEL CODE Prelim. Statement.

87. The same Preliminary Statement states:

> The Code . . . [does not] undertake to define standards for civil liability of lawyers for professional misconduct. *Id.*

88. *See* MODEL RULES pmbl.; MODEL RULES Scope; MODEL RULES Terminology. The Scope section of the *Model Rules* states:

> Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The Rules . . . are not designed to be a basis of civil liability . . . Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.

Id. at para. 6.

89. Concerning application of the ethics codes in malpractice cases, *see* Charles W. Wolfram, *The Code of Professional Responsibility as a Measure of Attorney Liability in Civil Litigation*, 30 S.C. L. REV. 281 (1979); *e.g.*, Woodruff v. Tomlin, 616 F.2d 924 (6th Cir.), *cert. denied*, 449 U.S. 888 (1980). For application of the ethical codes in the context of disqualification, *see, e.g.*, *In re* American Airlines 972 F.2d. 605 (5th Cir. 1992). For their significance in the context of other claims of lawyer wrongdoing, *see* Maritrans v. Pepper, Hamilton & Sheetz, 602 A.2d 1277 (Pa. 1992).

standards of a vocation are generally held to be evidence of the legal standard of care in practicing that vocation,[90] or at least a predicate for expert testimony as to what that standard is.[91] Thus, not withstanding the bar's attempted disclaimer in writing black-letter rules, the bar necessarily assumed certain unavoidable responsibilities.

A law-giver's responsibility includes taking account of existing law governing the matter directly under consideration; of law adjacent to and impinging upon the body of law being immediately addressed; of the tribunals in which the law will be enforced; and, of the types of evidence that are likely to be offered concerning controverted issues. With regard to the problem of client fraud, the ABA House of Delegates has been conspicuously derelict in all these respects.

Others have written of the difficulties in this respect posed by the 1970 *Model Code*, as interpreted by the ABA Committee on Professional Ethics.[92] The *Model Code* was interpreted to mean that a lawyer could not disclose client fraud. This meant that a lawyer was absolved from any responsibility for rectifying client fraud in which his services had been used, although a duty of rectification that had at least moral force had been prescribed by Canon 41 of the 1908 *Canons*.[93] The prohibition against disclosure had further implication, however. If taken seriously, it meant that a lawyer *could not* disclose client fraud in order to forfend being implicated as an accessory. This was a very serious problem as demonstrated by *United States v. Benjamin*.[94] Nowhere in the text of the *Model Code* or in the interpretation by the ABA Committee on Professional Ethics was any heed paid to decisions such as *United States v. Benjamin*.[95] Perhaps it was

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90. *See, e.g.*, Mirabito v. Liccardo, 5 Cal. Rptr. 2d 571, 574 (Cal. Ct. App. 1992) (holding that where the rules afford the standard by which an attorney's breach of his fiduciary duty is measured, the rules can be admitted as evidence of a breach and may be included in the instructions to the jury).

91. *See* Hizey v. Carpenter, 830 P.2d 646, 654 (Wash. 1992) (holding that in an action for legal malpractice, experts on an attorney's duty of care may base their opinion on the lawyer's failure to conform to an ethics rule but may not make explicit reference to either the *Model Rules* or *Model Code*).

92. *See generally, e.g.*, J. Michael Callan & Harris David, *Professional Responsibility and the Duty of Confidentiality: Disclosure of Client Misconduct in an Adversary System*, 29 RUTGERS L. REV. 322 (1976) (arguing that the existing principles governing disclosure must be clarified in order to remove vagueness and ambiguity and provide the attorney with reasonably clear guidelines concerning his duties under the law and the code of ethics); Note, *Client Fraud and the Lawyer—An Ethical Analysis*, 62 MINN. L. REV. 89 (1977) (examining the potential misuse of DR 4-101 by unscrupulous clients and proposing a new disciplinary rule which would allow the attorney to reveal the fraud to the injured party without being subject to disciplinary action for the violation of the attorney-client privilege); Victor H. Kramer, *Clients' Frauds and Their Lawyers' Obligations: A Study in Professional Irresponsibility*, 67 GEO. L.J. 991 (1979) (proposing that an attorney unable to persuade the client to rectify the fraud must withdraw from representation).

93. *See supra* text accompanying note 18.

94. 328 F.2d 854, 863-64 (2d Cir.), *cert. denied*, 377 U.S. 953 (1964).

95. *Id.*

assumed that the honesty of honest lawyers would be self-revealing, and that challenges thereto would remain within the exclusive domain of fellow lawyers. An alternative explanation is that the bar wished to adhere to its understanding of the problem of client fraud, regardless of the law's understanding.

Elsewhere I have written of the difficulties in this respect in the ABA's 1983 Model Rules of Professional Conduct.[96] Suffice to say that again the bar evidently assumed that its understanding of law practice would prevail. The House of Delegates was able to accept the idea that a lawyer could disclose client secrets in order to save life and limb of a victim, at least under certain circumstances.[97] However, it was unable to comprehend a similar rule regarding client fraud. Nor was it able to see that, for transaction lawyers, a rule allowing disclosure of client fraud was necessary for self-protection. Nevertheless, lawyer self-protection was provided by devious amendment to the Comments to the Model Rules.[98]

Responsible law-giving required recognition at least that honest lawyers can suffer the misfortune of having dishonest clients; that such a lawyer is at risk of being drawn into a transaction which is tainted with fraud or other illegality; that in such an eventuality the lawyer can be charged with being an accessory to the client's wrongdoing; that honest lawyers should be able effectively to disengage themselves from client fraud; and that being able to effect such a disengagement requires clear legal authority to disclose client confidences if necessary to that purpose. It also requires having no tears for clients who draw their lawyers into fraudulent schemes.

Responsible law-giving would also require recognition that an honest lawyer would like to be able to protect an innocent victim against fraud of which the lawyer had been made an instrument by a faithless client.

When the *Model Rules* were presented for adoption in the states in the years after 1983, these hard facts generally were much better recognized.[99] In 1991 the ABA's Standing Committee on Ethics and Professional Re-

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96. *See generally* Geoffrey C. Hazard, Jr., *Rectification of Client Fraud: Death and Revival of a Professional Norm*, 33 EMORY L.J. 271 (1984) (examining the unsatisfying state of Rule 1.6 in exposing known fraud and proposing an amendment striking a fairer balance between the lawyer's duty under the confidentiality rule and the lawyer's duty to abide by the law).

97. *Model Rule* 1.6(b) in part provides:

> A lawyer may reveal [confidential] information to the extent the lawyer reasonably believes necessary:
>
> (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm . . . .

MODEL RULES Rule 1.6(b).

98. *See* Hazard, *supra* note 96, at 301-03.

99. *See* GEOFFERY C. HAZARD & SUSAN P. KONIAK, THE LAW AND ETHICS OF LAWYERING 290-92 (1990).

sponsibility invited the House of Delegates to do likewise.

B. HOUSE OF DELEGATES REDUX

The proposal by the Committee on Ethics was to amend Rule 1.6 of the *Model Rules* as follows:

> (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).
>
> (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
>
> (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm;
>
> (2) *to rectify the consequences of a client's criminal fraudulent act in the commission of which the lawyer's services had been used*; or
>
> (3) to establish a claim or defense on behalf of a lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.[100]

The recommendation was supported not only by the Committee on Ethics but by several other committees of the ABA.[101] It was opposed by most of the same players who had led opposition to the Kutak Commission proposal in the 1983 debate on the *Model Rules*, notably the American College of Trial Lawyers.

The case for permitting a lawyer to take action to rectify client fraud in which the lawyer's services had been employed was succinctly stated by Michael Franck, Executive Director the Michigan State Bar and a lawyer long active in matters of professional ethics:

> What is the harm of having no rectification provision when the client misuses the lawyer's services? One harm is the harm to the lawyer's reputation in the community as an honest person, a man or woman of integrity. Another likely harm is the lawyer's other clients. If, for example, the lawyer on behalf of one client has fraudulently obtained a loan from the largest bank in the community, that bank is unlikely to look very kindly upon applications for loans filed by the lawyer on behalf of other innocent clients. Another harm is [that] lawyer's exposure to future criminal or civil

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100. ABA/HOD, *supra* note 1, at 8. The proposed amendment is italicized.

101. Among the committees supporting the amendment was the Standing Committee on Professional Discipline, of which I was then a member.

> liability is increased because the lawyer is unable to do anything to limit the damage incurred by the victim . . . . Another harm is the increased likelihood the lawyer will be charged or sued as a co-conspirator because the lawyer is unable to publicly disassociate from the crime or fraud.[102]

The opponents met none of these points. They did not deign to acknowledge the existence of the courts' understanding of the law of agency and accessorial complicity—that a lawyer who covers for client fraud is legally liable as an accessory.[103] They did not deign to acknowledge the courts' understanding of the law of attorney-client privilege—that a lawyer can be required to disclose communications from a client that were made in furtherance of fraud.[104] Indeed, the opponents seemed to think that, when a lawyer is directed to give evidence about client fraud, the lawyer has a choice about whether to refuse. Although lawyers may think they have such a choice, the courts do not, and the courts are the ones who administer the attorney-client privilege.[105]

The opponents also seemed to think that affording the lawyer discretion to disclose client fraud would *worsen* the lawyer's situation of peril. Attorney William Brennan stated:

> [A]dopting the . . . proposal will surely expose lawyers to liability if they fail to reveal a client confidence in circumstances [that] claimant contends should have prompted disclosure. Such lawyers are protected since they cannot reveal what they are prohibited from disclosing.[106]

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102. ABA/HOD, *supra* note 1, at 8-9.

103. *See* Kadish, *supra* note 23, at 337; *see supra* text accompanying note 23.

104. *See, e.g.*, United States v. Zolin, 491 U.S. 554, 567-68 (1989) (holding that in appropriate circumstances *in camera* review of allegedly privileged attorney-client communications may be used to determine whether the communications fall within the crime-fraud exception); United States v. Hodge & Zweig, 548 F.2d 1347, 1355 (9th Cir. 1977) (holding that a client communication made to further a crime is not protected by the attorney-client privilege).

105. For example, at the August 1991 meeting of the House of Delegates, John Elam remarked:

> The amendment gives the lawyer discretion . . . to blow the whistle on the client and if he has that discretion, do you believe for one minute when the victim's lawyer brings a lawsuit against the client and the lawyer who represents that client is called to testify that the court will say, "Yes, you have the discretion so you may decide;" rather, we believe it will become mandatory and the lawyer will be forced to testify.

ABA/HOD, *supra* note 1, at 11. This reflects serious confusion. The matter that Rule 1.6 addresses is the *confidentiality* rule, governing whether a lawyer may of his own volition disclose client fraud; Mr. Elam is talking about the *attorney-client privilege*, governing whether a court may compel a lawyer to give testimony about client fraud. Moreover, where the court is seeking to compel testimony from a transaction lawyer, in ensuing litigation over the fraud, it will not "become" mandatory that the lawyer must answer. According to the settled law of attorney-client privilege, it already *is* mandatory. *See Hodge & Zweig*, 548 F.2d at 1355; *compare In re* Marriage of Decker, 606 N.E.2d 1094,1104 (Ill. 1992) (holding "that an attorney must, when directed by final court order, and after the court has properly determined that the information is not privileged, disclose the information to the court").

106. ABA/HOD, *supra* note 1, at 15.

Mr. Brennan's argument is premised on an assumption as to how victims of client fraud are likely to analyze their situation. Mr. Brennan's argument assumes that the victim's attitude is as follows:

> The lawyer's client committed fraud, but the lawyer was not involved in it. However, the lawyer thereafter found out about the fraud and was in a position to warn me and thus prevent or mitigate my loss; the lawyer's failure to warn resulted in loss for which I should be redressed.

On this assumption about the victim's attitude, it is coherent to argue that if there is liability when the lawyer *could* warn the victim but no liability if he cannot, and if the confidentiality rule prohibits the lawyer from warning the victim, then prohibiting disclosure by the lawyer will preclude liability for failure to give such a warning. However, according to my observation, the assumption is wildly unrealistic.

The victim's interpretation of a fraudulent transaction in which a lawyer has been involved is much more likely to be as follows:

> The lawyer knew the clients' misrepresentations were fraudulent, or at least the lawyer recklessly or negligently disregarded the possibility that they were. The lawyer therefore helped carry out the fraud; the lawyer's knowing or reckless complicity resulted in a loss for which he is responsible.

There are four reasons why this is likely to be the victim's interpretation. First, failure of one person to warn a victim of danger from a third person is generally not a basis of tort liability.[107] A victim of fraud is interested in establishing tort liability on the part of someone—the lawyer, if no one else.

Second, from the requirement that a transaction lawyer is obliged to use due diligence in doing a transaction, it may be inferred that a lawyer did use due diligence. From the premise that the lawyer did use due diligence, it may be inferred that the lawyer discovered or ignored facts that would have been uncovered in the course of due diligence. As a matter of the law of evidence, this in itself constitutes circumstantial evidence that the lawyer knew of or recklessly disregarded indicators that fraud was involved in a

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107. An exception exists where there is some kind of special duty. *See, e.g.*, Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334, 351 (1976) (holding that when a therapist determines, or should have determined, that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger). A lawyer is unlikely to be held to such a duty, particularly to a person not his client. *See, e.g.*, Hawkins v. King County, 602 P.2d 361, 365 (Wash. Ct. App. 1979) (holding that the obligation of attorney to warn, when confidentiality would be compromised to client's detriment, must be permissive at most, unless it appears beyond reasonable doubt that client has formed firm intention to inflict serious personal injury on unknowing third person).

matter in which the lawyer was providing assistance.[108] That, in turn, is a basis for accessorial liability on the lawyer's part.

Third, in most transactions in which a transaction lawyer may be charged with complicity in client fraud, the lawyer has been called upon to provide a third party opinion—an opinion addressed to the victim concerning various aspects of the transaction. As a matter of tort law, rendering such an opinion imposes on the lawyer a duty of due care to the addressee of the opinion. Together with the inferences that can be drawn from the lawyer's duty to use due diligence, that is a basis for tort liability arising from the third party opinion.[109]

And finally, the lawyer is likely to have professional liability insurance that could cover the loss.

C. ABA ETHICS COMMITTEE GIVES A TRY

The House of Delegates' rejection of the proposed 1991 amendment to Rule 1.6 evidently, and understandably, caused great consternation in the ABA Standing Committee on Professional Ethics and Responsibility. That Committee today, unlike its former incarnations, has fully appreciated the dangers posed to lawyers by the gap between the bar's understanding of the client fraud problem and the courts' understanding. Whereas the American College of Trial Lawyers has been preoccupied with the ethics of advocacy, which are essentially irrelevant to the client fraud problem,[110] the Committee was concerned with the ethics of transaction practice, where the lawyer is at risk from client fraud. The Committee, therefore, sought to do by interpretation what it could not accomplish by amendment.

Preliminarily, there is a serious question whether any further interpretation of Rule 1.6 was really necessary to permit a transaction lawyer to abort a transaction that was discovered to be fraudulent. True, Rule 1.6(b) as adopted by the ABA in 1983 did not, in terms, permit such a disclosure. The pertinent language was as follows:

> A lawyer may reveal [confidential] information . . . (1) to prevent the client from committing a criminal act that the lawyer believes is likely to

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108. *See* CLEARY, *supra* note 80, § 330 and text accompanying note 81.

109. *See* Greycas, Inc. v. Proud, 826 F.2d 1560, 1565 (7th Cir. 1987), *cert. denied*, 484 U.S. 1043 (1988); *see supra* text accompanying note 28.

110. An advocate becomes involved in a fraud case after the fraud is completed and for the purpose of defending the client against criminal or civil liability. The client's right to legal representation to defend such charges takes precedence over the possibility that successful defense will result in exculpation of an accused who is "really" guilty. A transaction lawyer becomes involved when the transaction is in the making, and when, if the transaction is tainted by fraud, fraud is in the making. No rule exculpates the lawyer if it is later found that he knew of circumstances indicating that fraud was involved.

> result in imminent death or substantial bodily harm; or
>
> (2) to establish . . . a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved . . . .[111]

Subparagraph (1) recognizes permission to disclose a client confidence, but is limited to client acts threatening life or bodily harm.[112] That does not cover fraud. Also, by negative implication that subsection denies permission to disclose client confidences *except* when life or bodily harm are threatened. Subsection (2) does not refer to prevention or rectification of client fraud, but to defense of a lawyer against such charges. [113] The time frame implicit in the term "establish a defense" appears to be retrospective, referring to criminal charges or civil claims that have already been filed.[114] And, by negative implication, that subsection too denies permission to disclose client fraud prior to that point.

However, as has been explained elsewhere,[115] the Comment to Rule 1.6 conferred discretion to make disclosure that the black-letter seemed to withhold.[116] The Comment, formulated with the cooperation of emissaries of the American College of Trial Lawyers, asserts two pertinent propositions.[117] One addresses the timing of disclosure of client confidences; the other addresses the content of such a disclosure.[118]

Concerning timing, the Comment indicates that the term "establish" in subparagraph (b)(2) operates not only retroactively to a charge of complicity in client fraud, but prospectively as well:

> Paragraph (b)(2) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion.[119]

This permits a lawyer to act when an "assertion" of culpability is made. Such an assertion could be implicit in any inquiry about the transaction, for example an inquiry from an investigating agency or a victim.

Concerning content of the disclosure, the Comment indicates that the lawyer can openly disavow involvement in the transaction, so long as the client's communications to the lawyer are not themselves disclosed:

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111. *Model Rules* Rule 1.6(b).
112. *Id.*
113. *Id.*
114. *Id.* at cmt.
115. *See* Hazard, *supra* note 96, at 303-04; 1 HAZARD & HODES, *supra* note 10, §§ 1.6:309-13.
116. MODEL RULES Rule 1.6 cmt.
117. *Id.*
118. *Id.*
119. *Id.*

> Neither this Rule nor [other pertinent rules] prevents the lawyer from giving notice of the fact of withdrawal and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like.[120]

At the time this Comment was written in 1983, a leading case involving securities fraud had recognized that a transaction lawyer's "silence . . . lent the appearance of legitimacy to" a transaction in which he was involved.[121] Since the Comment to Rule 1.6 allowed withdrawal of any "affirmation," and since standing law recognized that a lawyer's silence could constitute an affirmation, the Comment allowed a lawyer to withdraw his silence.[122]

The foregoing combination of black-letter and Comment in Rule 1.6 leaves much to be desired. The black-letter does not mean what it says and the Comment can be understood only with the aid of inside information about legislative history. Moreover, the Comment, if taken literally, would permit a lawyer to speak out about a client's transaction whether or not there is any justification by way of preventing fraud.[123] That is, if, as the Comment says, Rule 1.6 does not prevent a lawyer from speaking out against a transaction in which he had participated, then nothing in the *Model Rules* does so: Rule 1.6 *is* the rule requiring confidentiality of client information. And if that is the case, the Comment to Rule 1.6 completely undermines the principle of confidentiality.

In this light, further interpretation that would limit the lawyer's discretion to disclose client confidences could seem necessary. The discretion should be limited to situations where speaking out is reasonably necessary to prevent the consummation or the consequences of client fraud. There are many client fraud situations where speaking out is unnecessary. A typical situation is where the lawyer discovers the potential fraud, or what could be held to be such, before the deal is closed, and successfully insists that the transaction be cleaned up or abandoned. Transaction lawyers do this all the time in the confines of their offices. However, there is some risk that the uninitiated might not share the bar's understanding about the occasions and limits of exercising this discretion.[124]

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120. *Id.*; *see also* Ronald D. Rotunda, *The Notice of Withdrawal and the New Model Rules of Professional Conduct: Blowing the Whistle and Waving the Red Flag*, 63 OREGON L. REV. 455, 478-79 (1984) (examining the bar's struggle to deal effectively with the problem of the perjuring or fraudulent client).

121. SEC v. Nat'l Student Mktg. Corp., 457 F. Supp. 682, 713 (D.D.C. 1978) (holding that it is the lawyer's duty to "take steps to ensure" that the client discloses material information to shareholders).

122. MODEL RULES Rule 1.6 cmt.

123. *See* Hazard, *supra* note 96, at 297-99.

124. During the 1991 debate on the proposed amendment of Rule 1.6, Kurt Melchior of the San Francisco Bar offered a lurid illustration of rank betrayal by a young lawyer as reason for rejecting the amendment. However, the illustration involved litigation, not a transaction, and it came out of a Hollywood script, not real life. *See* ABA/HOD, *supra* note 1, at 19. My consultations with young

On the other hand, there is a lot to be said against attempting such a further interpretive gloss on Rule 1.6. In terms of the text of the *Model Rules* as such, the black-letter and Comment involve contradiction that cannot be resolved by coherent interpretation. In more subtle terms, it is hard to see why clarity should be sought in a text whose meaning was intended to be obscure: The reformer's lamplight in a professional claustrum? Moreover, at a practical level, the discretion conferred on transaction lawyers by the Comment in Rule 1.6 evidently is being exercised with great restraint—perhaps excessive restraint if the aftermath of the Savings & Loan litigation is any sample.

Nevertheless, the ABA Committee on Professional Ethics has given it a try, in Formal Opinion 93-366.[125] The Opinion revolves around a detailed hypothetical, which those conversant with the problem of client fraud will recognize as closely patterned on the notorious OPM case.[126] The conclusions arrived at in the opinion are that:

> *First*, the lawyer must withdraw from any representation that, directly or indirectly, would have the effect of assisting the client's continuing or intended future fraud.
>
> *Second*, the lawyer *may* withdraw from all representation of the client, and *must* withdraw from all representation if the fact of such representation is likely to be known to and relied upon by third persons to whom the continuing fraud is directed, and which the representation is therefore likely to assist.
>
> *Third*, the lawyer may disavow any of her work product to prevent its use in the client's continuing or intended future fraud . . .
>
> *Fourth*, if the fraud is completed, and the lawyer does not know or reasonably believe that the client intends to continue the fraud or commit a future fraud by use of the lawyer's services or work product, the lawyer may withdraw from the representation of the client but may not disavow any work product.[127]

The third of these conclusions—that a lawyer may "disavow any of her work product to prevent its use in the client's continuing or intended future

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lawyers seeking ethical advice indicate that they are at least as sensitive to the obligation of confidentiality as senior lawyers. They are also far less disposed to self-deception about the moral implications of keeping silent while a client proceeds with legal wrongdoing.

125. For the text of the opinion, see LAWS. MAN. ON PROF. CONDUCT (ABA/BNA) § 1001:134 (1992).

126. The OPM case involved a computer leasing company that borrowed large sums from banks on the strength of forged documents purporting to evidence long term equipment leases. *See* Robert N. Treiman, *Inter-Lawyer Communications and the Prevention of Client Fraud: A Look Back at O.P.M.*, 34 UCLA L. REV. 925 (1987).

127. *See* Op. 92-366, *supra* note 2, at 1001:135.

fraud"—is in my opinion accurate. Discretion to that effect is conferred by the Comment to Rule 1.6 permitting a lawyer to "withdraw or disaffirm any opinion, document, affirmation, or the like."[128] Discretion to that effect is confirmed by principles of agency law, under which an agent has a privilege to take measures of self-protection against exploitation by the principal.[129] Such discretion is also implied from principles of criminal and tort law. Under those principles, a lawyer who has assisted a transaction which she then discovers is fraudulent and whose harmful effect is not fully consummated, is at risk of being an accessory to the fraud.[130] Steps to avoid complicity in crime or tort are legally privileged.[131]

However, Rule 1.6 as construed in its Comment already covered this ground.[132] If that were all that Opinion 92-366 accomplished, it would not have been worth the trouble. Obviously, the Committee had additional objectives, those stated in its other three conclusions. Unfortunately, in my opinion, these conclusions are seriously erroneous in important respects. The structure of reasoning on which they are based implies obligations that have no foundation in law and which, if recognized as legal obligations, would substantially enlarge transaction lawyers' exposure to liability for client fraud. Moreover, the hypothetical in Opinion 92-366 betrays a certain unrealism about key aspects of practice in matters of corporation law.[133] Under a realistic view of corporate law practice, it is usually possible for the lawyer to induce corrective action by the corporation's officials without going public. The remainder of this essay develops these points.

1. Erroneous Conclusions

The first conclusion stated in the Opinion is that a lawyer "*must* withdraw from any representation of the client that, directly or indirectly, would have the effect of assisting the client's continuing or intended future fraud."[134] This statement is much too broad. Two examples suffice.

First, suppose a lawyer is engaged to defend a client against a criminal or civil charge of having defrauded a third person. The lawyer has not previously been involved in the transaction. From confidential communication with the client, the lawyer concludes that in all probability the client

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128. MODEL RULES Rule 1.6 cmt.

129. *See* RESTATEMENT (SECOND) OF AGENCY § 395 cmt. f.

130. *See* Hazard, *supra* note 24.

131. *See* MODEL PENAL CODE § 2.06(6)(c).

132. MODEL RULES Rule 1.6 cmt.

133. It appears that the hypothetical originated from the ABA Business Law Section. *See* ABA Press Release, Aug. 8, 1992.

134. Op. 92-366, *supra* note 2, at 1001:135.

in fact committed the acts charged and has kept the proceeds.[135] The lawyer successfully defends the client, by such legal stratagems as pleading the statute of limitations, obtaining dismissal before trial on the ground that the prosecuting party had failed to establish fraud by the requisite strength of proof, or at trial by persuading the trier of fact that the client's conduct did not amount to fraud. From a realistic viewpoint, any such success on behalf of the client "indirectly . . . would have the effect of assisting the client's continuing . . . fraud."[136] According to Opinion 92-366, the lawyer would be required to withdraw from the representation once he concluded that the client was probably guilty.[137] This is contrary to law.

Second, suppose that years ago the client engaged a lawyer for assistance in a securities matter, long since consummated. The lawyer now is engaged by the client in unrelated matters. While so engaged, the lawyer happens to discover that representations in the prospectus for the securities issue were materially misleading under the standards of Rule 10(b)(5),[138] and that the assets acquired with the proceeds are the foundation of the client's present prosperity. From a realistic point of view the prior engagement in the securities matter "indirectly" . . . would have the effect of assisting the client's continuing fraud."[139] According to Opinion 92-366, the lawyer would be required to withdraw from the current engagement. This is not required by law, nor in my opinion should it be.[140]

The point of these illustrations is that great care must be taken in statements by a law-giver about the relationships between a lawyer's services and legally wrongful consequences. Among the relevant variables are the nature of the lawyer's services (whether advocacy or transaction assistance), the content, timing, and degree of certitude of the lawyer's knowledge of the inculpatory facts, and whether there is a proximate causal connection between the lawyer's conduct and the harm to the victim. The legal significance of these variables, and, therefore their significance in professional ethics, is determined by legal rules and concepts extrinsic to the rules of professional ethics as such—the law of agency accessorial complicity, *mens*, proximate cause, etc.

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135. In one interpretation, the lawyer will not "know" that the client committed fraud because it is part of the advocate's function in such a case to suspend personal belief about the client's innocence. *See* FREEDMAN, *supra* note 16. *Compare* MODEL RULES Rule 3.3 (specifying certain kinds of facts that an advocate is permitted or required to "know").

136. *See* Op. 92-366, *supra* note 2, at 1001:137.

137. Authors and supporters of Opinion 92-366 will protest that this is not what was meant. I know that. I am simply pointing out what the language implies when taken at face value.

138. 17 C.F.R. § 240.10(b)(5).

139. *See* Op. 92-366, *supra* note 2, at 1001:137.

140. Again, I am sure the Committee did not intend this implication, I am simply pointing out the implication of the language.

The second conclusion stated in the Opinion is that a lawyer "*must* withdraw from all representation if the fact of such representation is likely to be known to and relied upon by third persons to whom the continuing fraud is directed . . . ."[141] This statement is inaccurate. Again, an example should suffice.

Suppose a law firm had assisted a client in a securities transaction by rendering an opinion relied upon by a defrauded purchaser. After that transaction is closed, the law firm accepts an engagement to prosecute an unrelated civil action on behalf of the client. At that point the purchaser sues the law firm and the client, charging them both with complicity in the fraud. In this situation it is clear that the firm may wish to withdraw from the second engagement, and may be required to do so because of imminent conflict of interest with the client in their positions in the fraud suit. But the rationale in Opinion 92-366 is that the firm must withdraw because "continued representation would constitute assisting the client in a course of conduct known to be fraudulent in violation of Rule 1.2(d)."[142]

The Opinion's proposition here is startling. Rule 1.2(d), to which the Opinion refers, provides that:

> A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent . . . .[143]

The Opinion goes far beyond Rule 1.2(c). It says that a lawyer's act of having assisted a client in a transaction, then learning the transaction was tainted with fraud, will constitute "assisting" the fraud if the lawyer continues to represent the client in unrelated matters. If the lawyer continues to represent the client there is, of course, risk that the injured party will *suspect* that the lawyer had culpable knowledge when the transaction was done, rather than having learned of the fraud only later. Moreover, the lawyer is probably well advised to disavow the transaction in order to avoid being charged with complicity. These real-world risks militate for giving the lawyer *discretion* to disclose.

But Opinion 92-366 goes further: It says that failure to disavow fraud in which one was an innocent participant constitutes *assistance* if the fraud has not yet been discovered by the victim.[144] Stated differently, the proposition is that a lawyer who does not disclose client fraud, after discovering it, becomes an accessory by failing to blow the whistle. That proposition has no basis in law and would indeed convert a lawyer into a policeman.

The fourth conclusion in the Opinion is equally unsound, but in the op-

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141. *See* Op. 92-366, *supra* note 2, at 1001:135.
142. *Id.* at 1001:37.
143. *Id.*
144. *Id.*

posite direction. This conclusion is that:

> [I]f the fraud is completed, and the lawyer does not know or reasonably believe that the client intends to continue the fraud . . . the lawyer may withdraw from representation of the client but may not disavow any work product.[145]

This conclusion contradicts the Comment in Rule 1.6 that permits a lawyer to disavow work-product which was employed in a transaction that the lawyer later discovers was tainted by fraud.[146] It also contradicts standing law and a generally shared understanding within both the bench and the bar.

Consider the following example: A lawyer assists a client in a securities matter, the engagement is completed and no other work is done for the client, and the lawyer thereafter discovers that the transaction was fraudulent. This discovery results when inquiries to the lawyer from the Security Exchange Commission or the Justice Department clearly intimate that the transaction was fraudulent and that the lawyer is suspected of having had culpable knowledge when the transaction was done.

The example just stated is in *Meyerhoffer,*[147] where the court held that in such circumstances the lawyer was privileged to disclose in order to forfend accusation of complicity.[148] And such was the intended meaning of the Comment about "noisy withdrawal."[149] According to Opinion 92-366, however, the lawyer cannot "disavow any workproduct." [150] The Opinion states:

> [D]isaffirmance [is allowed] only in circumstances where the lawyer's withdrawal is ethically *required* because of the client's intention of using the lawyer's services . . . in a continuing or future fraud.[151]

That is, if the fraud has been consummated, the lawyer can only wait until a charge is made and then makes his defenses.[152]

2. The Unreal World of the Ethics Committee's Hypothetical

To comprehend how the ABA Ethics Committee reached its extraordinary second and fourth conclusions, it is necessary to follow the pathway by which the Opinion proceeds. This requires considering the hypothetical to which the Opinion responds.

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145. *See supra* text accompanying note 127.
146. *See supra* text accompanying note 120.
147. Meyerhoffer v. Empire Fire & Marine Ins. Co., 497 F.2d 1190 (2d Cir. 1974).
148. *Id.*
149. *See* HAZARD & HODES, *supra* note 10; Hazard, *supra* note 96.
150. *See* Op. 92-366, *supra* note 2, at 1001:142.
151. *Id.* at 1001:139. Emphasis in original.
152. *See* MODEL RULES Rule 1.6(b)(2).

The hypothetical is in essence as follows: A corporation procures a three-year term loan from a bank on the basis of fraudulent statements about the corporation's financial condition; the lawyer for the corporation renders an opinion on various legal aspects of the transaction; a year later "the CEO and the treasurer have now confessed the fraud to the lawyer but not to the independent auditors or anybody else;"[153] the officers intend to hire other counsel, to obtain new loans, and to continue to deal with the bank; "further reliance by the bank on the [original] fraudulent financial statements would of course necessarily entail reliance as well on the lawyer's opinion vouching for the principal asset reflected therein;"[154] the CEO asks the firm to continue as counsel in nonfinancial matters, so as to avoid exciting suspicion; the lawyer "has informed the third member of the client's board of directors, who was not involved in the fraud . . . and . . . advised the lawyer that he believes the company will survive, and that for the time being he intends to take no action."[155]

It is possible that a transaction could have occurred in this way, but very unlikely. In the first place, it is very unlikely that a corporate CEO and chief financial officer would confess a major fraud to the corporation's lawyer. These days, a moderately well-informed corporate official would know that in such a matter she should seek legal advice from someone other than the company's attorney. After all, her conduct constitutes a crime, fraud on third parties, fraud against the corporation, and, perhaps not least important, fraud against the lawyer.

Second, if the corporation's counsel actually was approached by a corporate officer apparently bent on such a confession, the lawyer should soon interrupt with a "Miranda warning" that the communication would not be protected by an attorney-client privilege in favor of the officer.[156] Rather, the privilege is that of the corporation and could be waived by the board or by successor management.[157] A lawyer who failed to give such a warning could be charged with conflict of interest and exposed to eventual suit for malpractice.

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153. *See* Op. 92-366, *supra* note 2, at 1001:136.

154. *Id.*

155. *Id.* at 1001:137.

156. *See* MODEL RULES Rule 1.13(d):

> In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

Id.

157. *See* Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 358 (1985) (holding that the trustee of a corporation in bankruptcy has the power to waive the corporation's attorney-client privilege).

Third, it is very unlikely that corporate officers would feel impelled to make such a confession unless the roof was already caving in.[158] If the roof was caving in, there would be others beside the officers who would have information that, if checked out, would be indicative of fraud. It is fantasy to think that such information could have been kept from "anybody else" for very long.

Fourth, it is likely the corporation's accountants would have had clues that fraud was involved before the lawyer did. The lawyer would have to consider that possibility, and the ensuing possibility that the accountants will be taking forceful action to seal off their own liability. Self-protective action by the accountants would require the accountants to do some whistle-blowing. If the corporation's lawyer remains silent while the corporation's accountants blow the whistle, the lawyer's silence can be construed as coverup, subjecting him to liability to the corporation.[159]

Fifth, it would be very unusual for the lawyer's opinion to be "*vouching*" for anything, let alone vouching for the company's "principal asset." It is disturbing that an official committee of the organized bar should suggest that a transaction lawyer's third party opinion is on par with the "representations and warranties" made by the client.

Sixth, it is very unlikely that the third director, when apprised that the company had committed a major fraud against the bank, would sanguinely accept that fact and opt for quiet forbearance. That course of action would court personal liability on the part of that director and certainly invite litigation charging complicity through inattention to directorial duties. If the third director obtained independent legal advice, it is unlikely that he would remain silent. In my observation, a director who has not been complicit in fraud will insist that appropriate rectifying measures be taken immediately: Why should he take the rap? If the third director had been complicit in the fraud, contrary to the facts of the Opinion's hypothetical, the lawyer now confronts a situation in which the board as well as the top officers are accomplices. If that is true, and if there are other shareholders, the lawyer may have a duty to advise them of the corporation's financial peril. Those circumstances pose the risk that the bank will infer that the lawyer was also an accomplice.

Moreover, if the lawyer did not advise the third director to seek independent legal advice, the third director would regard the lawyer as representing him as well as the company, which would involve the lawyer in conflict of interest, which also could lead to an eventual malpractice suit.

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158. In the real OPM case, the roof was indeed caving in. The perpetrators were having to escalate their frauds to keep pace with the demands for repayment from the banks.

159. *See* FDIC v. O'Melveny & Myers, 969 F.2d 744 (9th Cir. 1992).

Thus, when the actualities of law and corporate practice are taken into account, the hypothetical assumed in Opinion 92-366 is surreal. It is very difficult to work out a sound legal and ethical analysis on such a basis.

The question then presents itself: Why did the ABA Ethics Committee go to such length in unreality? The Ethics Committee's unstated thesis seems to be that a lawyer should not have *discretion* to disclose, but only a limited *duty* to disclose. The steps to establish this thesis are as follows:

-A lawyer *may* not disclose client confidences except where he *must* disclose client confidences, because giving the lawyer discretion in such a delicate matter would unduly jeopardize the principle of confidentiality.

-A lawyer *must* disclose only where the lawyer also must withdraw to avoid *assisting* client crime for fraud.[160]

-When a lawyer's work product is being used by a client to perpetuate a fraud, it constitutes *assisting* the client's crime or fraud.

3. Misguided Virtue Makes Bad Law

The bridge to this last proposition is a truly breathtaking proposition:

> [W]here the client avowedly intends to continue to use the lawyer's work product, this amounts to a *de facto* continuation of the representation even if the lawyer has ceased to perform any additional work.[161]

There was a dissent to the Opinion that focussed on many of the deficiencies outlined above. [162] Among the protestations in the dissent are the following:

> This novel gloss requires a lawyer to anticipate every conceivable effect her facially-unexceptionable representation could have, in order to determine whether a client intent upon crime or fraud could directly or indirectly be assisted in its nefarious schemes by her otherwise benign work product or services.[163]

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160. *Model Rule* 1.16(a) requires withdrawal where the lawyer's services "will result" in a violation of ethical duties, including the duty to refrain from assisting a client in crime or fraud. *See* Op. 92-366, *supra* note 2, at 1001:141 which states:

> Under the mandate of Rule 1.16(a)(1) that a lawyer shall withdraw if the representation will result in a violation, the term "representation" must be read to include a lawyer's permitting the client's continued use of the lawyer's pre-existing work product. Similarly, under the injunction in Rule 1.2(d) that a lawyer shall not "assist a client in conduct the lawyer knows is criminal or fraudulent," the term "assist" must be reasonably construed to cover a failure to repudiate or otherwise disassociate herself from prior work product the lawyer knows or has reason to believe is furthering the client's continuing or future criminal or fraudulent conduct. *Id.*

161. Op. 92-366, *supra* note 2, at 1001:142.

162. *Id.* at 1001:144.

163. *Id.*

> Nowhere in Model Rule 1.2(d) is there a syllable of suggestion that "shall not assist" includes a prohibition upon maintaining . . . confidentiality . . . when the lawyer knows of a client's intent to use the completed work product of past completed professional services for fraudulent purposes.[164]

> Lazarus-like, the long-since interred [representation in the bank transaction] is raised from the dead, becoming a present representation, and hence capable of having the future effect [of impermissible assisting the client's fraud.][165]

The point of the dissent is that the Opinion is a very poor interpretation of the *Model Rules*, and, therefore, a very poor rendition of the profession's "understanding." The dissent is surely correct in this regard. Even worse, the Opinion reflects a very bad understanding of law.

The notion of law on which the Opinion rests is this: A lawyer is legally responsible for consequences of conduct by a client that occurs after the lawyer's own conduct has come to rest, concerning facts about the transaction of which the lawyer was ignorant.[166]

This premise implies that a lawyer continues to represent every client for whom the lawyer's work product still has legal effect. This is a bizarre conception of an agent's legal responsibility to the principal.[167] For example, it suggests that a lawyer would have an indefinitely enduring responsibility to revise documents previously prepared and opinions previously rendered, in order to reflect subsequent changes in law or in circumstances.[168] The notion of continuing representation also suggests that a transaction client is indefinitely thereafter a concurrent client, and never becomes a former client. This would yield bizarre consequences under the conflict of interest rules.[169] Most serious of all is the notion that a lawyer continues to represent a client so long as the lawyer's work product has legal effect. This notion entails a bizarre and disastrous conception of criminal and tort liability—that failing to disavow is equivalent to aiding and abetting. There are cases where victimized plaintiffs have tried to base liability on such a

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164. *Id.* at 1001:146.

165. *Id.*

166. As the dissent protested, "What if the lawyer does not know the client is using the old work product?" *Id.* at 1001:147.

167. As the dissent protested, "What duties does the lawyer owe to the revived client during this second representation period?" *Id.*

168. *Cf.* Smith v. Lewis, 530 P.2d 589, 596 (Cal. 1975) (liability for failure to take account of prospective legal development).

169. As against a current client, a lawyer may not undertake any other representation that is materially adverse, whether or not the other matter is unrelated. *See* MODEL RULES Rule 1.7(a). As against a former client, a lawyer may undertake other representation that is materially adverse so long as the matter is not "substantially related" to the matter formerly involved. *See* MODEL RULES Rule 1.9(a).

theory, but the courts properly have not accepted it.[170]

CONCLUSION

The American College of Trial Lawyers and the ABA Standing Committee on Ethics and Professional Responsibility have projected understandings of the transaction lawyer's role and responsibility that are consistent only in the degree of their misdirection. The College's understanding, as evidenced by its opposition to amending Rule 1.6, is that a lawyer may never prevent complicity until confronted with a charge of aiding and abetting the client in consummating fraud. This may be called "Waiting for the Grand Jury." The Committee's understanding, as evidenced by Opinion 92-366, is that a lawyer is in complicity until he has prevented the client from consummating fraud. This might be called "Parental Responsibility."

If this is the bar's understanding of the lawyer's role and responsibility, the legal profession would be better off adopting the understanding established by the courts.

170. *See* Barker v. Henderson, 797 F.2d 490 (7th Cir. 1986).